No. 11,561

In The

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN TRUCK LINE, Inc.,
a corporation,

Appellant

vs.

EARL DUNN,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division

BRIEF FOR APPELLANT

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Printed by the Seward Polaris Seward, Alaska

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STATUTES

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JURISDICTIONAL STATEMENT

The Appellee sued the appellant for the sum of $1500.00 on a quantum meruit for the value of services rendered and money, labor, equipment and supplies furnished by plaintiff to defendant, in negotiating certain contracts between the defendant and the Civil Aeronautics Administra-

tion of the United States. (Transcript of Record, Pages 2, 3 and 4.)

The defendant's answer denies all the allegations of the complaint, except that the corporate capacity of the defendant is admitted. (Transcript of Record, Pages 4 and 5.)

This Court has jurisdiction to entertain the appeal by virtue of the provisions of the Act of Congress of May 31, 1935, 49 Statues-at-Large 313, which is as follows:

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions * * * * Third, In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; * * * *"

STATEMENT OF THE CASE

In January, 1944, the plaintiff and one Chris Haugen arrived in Anchorage, Alaska, from Dawson Creek, Canada, where both had been engaged in the trucking business, the latter as a stockholder and acting manager of the defendant corporation. In company with each other they had interviews and negotiations with officials of the Civil Aeronautics Administration of the United States regarding the securing of hauling contracts from that authorty for the Northern Truck Line, Inc., the defendant corporation. The negotiations resulted in such contracts being awarded to the defendant. The plaintiff, Dunn, took a very active part in the negotiations, even going so far as to represent himself as the manager of the defendant corporation, and to sign his name as such to bids for contracts, (Transcript of Record, Page 41), all without objection on the part of the said Haugen.

On the trial the plaintiff testified that his services rendered in connection with obtaining the aforesaid contracts were rendered pursuant to a verbal agreement made be-

tween himself and the said Chris Haugen, in Dawson Creek, Canada, in December, 1943; that it was agreed by and between plaintiff and the said Haugen, acting for the defendant corporation, that plaintiff and Haugen would go to Alaska, and there jointly endeavor to secure hauling contracts and jobs for the defendant corporation, the profits from said contracts and all trucking done in Alaska to be divided equally between plaintiff and defendant; that the plaintiff would be an equal partner with the defendant corporation in the trucking business in Alaska. (Transcript of Record, Pages 39, 52 and 53.)

The witness Haugen, testified on behalf of the defendant that the plaintiff's interest in securing the contracts for the defendant was what he would make by the employment of his own trucks on the hauling work—at so much per ton mile. (Transcript of Record, Pages 76 and 77.)

However, although in his complaint plaintiff alleges that the defendant received the sum of $55,425.48 for hauling it performed for the Civil Aeronautics Administration, he did not sue on the alleged partnership contract but on a quantum meruit, and for the purposes of this appeal and on the assigned errors, it is immaterial whether or not there was a partnership contract or agreement to divide profits. It is enough that there was a substntial conflict of testimony on that issue, which was raised by the evidence and not by the pleadings.

At the conclusion of the testimony, and both sides having rested, the defendant moved the court to instruct the jury to return a verdict for the defendant, said motion being based upon the ground that there was no evidence to submit to the jury to justify a verdict for the plaintiff. (Transcript of Record, Page 115.) This motion was denied, and exception allowed. This ruling is made the basis of Assignment of Error I. Assignment of Error III is based upon exceptions to certain instructions of the Court

The jury returned a verdict for the plaintiff in the sum of $1500.00 and certain interest and judgment was entered thereon accordingly.

SPECIFICATIONS OF ERROR

The appellant relies upon Assignments of Error I and III, which are as follows:

ASSIGNMENT OF ERROR I

That the Court erred in overruling the motion of the defendant, made at the conclusion of the evidence, that the court direct the jury to return a verdict for the defendant, said motion being based upon the ground that there was insufficient evidence to submit to the jury to justify a verdict for plaintiff, to which ruling defendant excepted and the exception was allowed. (Transcript of Record, Page 11.)

ASSIGNMENT OF ERROR III

That the Court erred in instructing the jury as follows:

"To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint namely, that during, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor, equipment and supplies of the reasonable value of $1500.00 that plaintiff has demanded of defendant payment of said sum and defendant has failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff." (Transcript of Record, Page 12.)

ARGUMENT

ON ASSIGNMENT OF ERROR I

The plaintiff having elected to sue on a quantum meruit the burden was upon the plaintiff to prove the value of his services, and of the equipment and supplies furnished by him in negotiating the contracts on behalf of the defendant with the Civil Aeronautics Administration.

There is not a scintilla of testimony in the record of the value of said services, etc.

Neither the plaintiff nor any witness of the plaintiff has placed, or even attempted to place, any value on the plaintiff's services, nor on the equipment or supplies furnished.

The plaintiff does furnish some testimony which throws some light on what he meant by "equipment and supplies furnished".

He testified on cross examination (Transcript of Record, Page 62), as follows: "By furnishing equipment and procuring contracts, is a motor car which I drove many thousand of miles not equipment? I drove that motor car down here in January. I used that in procuring a contract let in April. What I mean is that I am in so much money in my expenses to Alaska on account of an arrangement that I say I made with Mr. Haugen on behalf of the Northern Truck Line Comany. I spent my money because I thought I was a partner."

And on Page 49, Transcript of Record, there is the plaintiff's testimony as to loss of time and expense incurred by him in the summer of 1944, which might possibly be the basis of a damage suit against the man Chris Haugen, or the Northern Truck Line, Inc., for breach of contract.

As to the money advanced, there is the testimony of plaintiff that he loaned Chris Haugen $75.00 to pay his personal expenses and that part of it was paid back, how much he did not state.

We repeat that there is no evidence whatever in the record from which the jury were justified in placing any specific value on plaintiff's services, nor on the money, supplies and equipment alleged to have been furnished in procuring the contracts.

On the evidence in the record, the jury could as well have found the services, etc., to have been worth $2500.00, had the complaint so alleged, or any other sum which the complaint might have alleged.

The jury was permitted to infer the value of the services, etc., from the allegations of the complaint and the plaintiff's narration of what the services consisted.

In Southwestern Arizona Fruit and Irrigation Co. v. Cameron, 141 Pac. 572, a case very much in point in several respects, the court says:

> We know of no principle of law that would authorize a jury, or a court sitting as a jury, in the absence of evidence of value, arbitrarily to find a value. It might be more expeditious to dispense with such proof, and leave the value to be determined by the court or jury from their common knowledge and understanding of values, but the law, in the absence of an agreement between the parties as to the value, insists that it is an issue to be tried * * * * it became necessary that evidence on the issue of value under the quantum meruit count be offered before the court would have a basis for a verdict or judgment upon that issue. And that court cites Thompson on Trials, Sec. 2606, as follows:
>
> "Where the verdict which the jury return cannot be justified upon any hypothesis presented by the evidence, it ought to be set aside. * * * * It would be a verdict without evidence to support it; and it is not

to be tolerated that the jury should assume, in disregard of the law and the evidence, to arbitrate differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim."

ARGUMENT

ON ASSIGNMENT OF ERROR III

The instruction complained of under this assignment will for convenience be again set out, as follows: (Transcript of Record, Page 118.)

> "To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that during, or about the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor, equipment and supplies of the reasonable value of $1500.00; that plaintiff has demanded of defendant payment of said sum and defendant has refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff in such sum as you find him justly entitled to receive, but not in any event to exceed $1500.00. You may, if you think the evidence justifies, find a verdict in favor of the plaintiff and against the defendant for any sum less than $1500.00. But if the plaintiff has failed to prove the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict must be for the defendant."

This instruction is fair on its face. But it must be re-

membered that the plaintiff predicated his right to sue on a quantum meruit, on his testimony to the effect that the services rendered by him to the defendant were rendered pursuant to a partnership agreement, which the defendant repudiated. The plaintiff was not apprised by the complaint of any claim of a partnership agreement.

The instruction complained of fails to take into account that the witness, Haugen, denied any such partnership agreement and testified that the plaintiff's interest in the prospective hauling and freighting was the use of his, the plaintiff's trucks. (Transcript of Record, Pages 76 and 77.)

Haugen is corroborated by the witness, Walter C. Williams, who testified that in March, 1944, he did some typing for the plaintiff. (Transcript of Record, Pages 103 and 104.) Williams was an employee of the Civil Aeronautics Administration. Later in the trial Williams was recalled and testfied as follows:

> "Q. Mr. Williams you have been sworn. At the time you typed the letter for the plaintiff, Mr. Dunn, that you testified about, did you have a conversation with him about what he expected to make out of any hauling contracts obtained by himself and the Northern Truck?"
>
> "A. It was in a discussion. It came about the time we were asking who should be—or what signature he should put on the letter—and I said 'Are you connected with the Northern Truck Lines, or how do you get your pay? What connection is it?' He said: 'Well, I will get my share out of the trucking I do'—put in his trucks and get the share out of the trucking."

The jury may well have believed this testimony and that

of Haugen and disbelieved that of the plaintiff, who was thoroughly impeached. It is a complete defense to an action on a quantum meruit. True, this defense was not pleaded affirmatively. But defendant's first notice of plaintiff's claim of a partnership contract, and the repudiation thereof, was when plaintiff testified. The instruction complained of completely ignores this defense, which is a complete defense to the action.

Furthermore, the plaintiff is precluded by his testimony from suing on quantum meruit. He testified to an express contract, clear and unequivocal in its terms, which would entitle him to half the profits. If his testimony was true he was as much entitled to recover on this verbal contract, as if it had been reduced to writing. He may have believed that there were no profits made on the Civil Aeronautics Administration contracts, although the evidence is that the defendant received therefrom the gross sum of $55,425.43. He admitted that he never demanded an accounting of the profits nor his share thereof. He settled for other work on a per ton mile basis. It evidently seemed to him that his best bet was to sue on a quantum meruit, but if his story of the partnership contract and its reudiation by the defendant was pure concoction, as the jury may well have believed, then there was no justification for a resort to that form of action.

In this connection we quote from the opinion in Carpenter v. Josey Oil Co., 26 Fed. (2) 442-444, as follows:

> "(3) Quantum meruit refers to that class of obligations imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice. The form of action is contract, but they are not contracts, because the parties do not fix the terms and their intentions are disregarded.* * * * Further, where the relations of the parties can

be ascertained from an express contract *as explicit as the one at bar, it is not necessary to resort to this legal fiction.* * * * *".

CONCLUSION

We submit that the judgment of the District Court should be reversed on the first error assigned, to-wit, that the court erred in denying the plaintiff's motion for a directed verdict.

It is true that after the motion was made and denied, the case was re-opened, but the evidence subsequently received in no way affected the merits of the motion, and the record is certified by the trial judge to contain all the evidence in the case.

A consideration of the argument made on Assignment of Error III, the giving of the instruction complained of may not be necessary to a decision of this appeal, but we believe the question raised by this assignment should be determined, in view of a probable retrial, in case of reversal.

Dated September 2, 1947.

Respectfully submitted,

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